

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUN - 8 2004

Federal Communications Commission
Office of Secretary

In the Matter of)

The Pay Telephone Reclassification
and Compensation Provisions of the
Telecommunications Act of 1996)

CC Docket No. 96-128

PETITION FOR WAIVER

Pursuant to section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") rules,¹ ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom and Business Telecom, Inc. ("BTI") (collectively referred to herein as "ITC^DeltaCom" or "Petitioner"), through their counsel, request a limited waiver of the Commission's payphone call tracking system audit requirements set forth in the Commission's *Payphone Audit Report and Order* and section 64.1320 of the Commission's rules, 47 C.F.R. § 64.1320.² Specifically, ITC^DeltaCom requests a waiver, and extension, until January 1, 2005, in which to complete the payphone system audit and file the System Audit Report with the Commission, payphone service providers ("PSPs"), and interexchange carriers ("IXCs"), as applicable. Good cause exists for granting this waiver.

I. BACKGROUND

On October 3, 2003, the Commission released the *Payphone Audit Report and Order*, which requires, *inter alia*, all completing carriers to undergo an audit of their payphone

¹ 47 C.F.R. § 1.3.

² *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975 (2003) ("*Payphone Audit Report and Order*"); 47 C.F.R. § 64.1320(a)-(b).

No. of Copies rec'd 014
List ABCDE

compensation tracking system by an independent third party auditor and to file the System Audit Report with the Commission, each PSP for which it completes calls, and each facilities-based long distance carrier from which it receives calls.³ On May 11, 2004, the Commission announced that its audit requirements would be effective July 1, 2004.⁴ Due to the current stage of network integration between ITC^DeltaCom and BTI, and the time constraints of various auditing companies,⁵ ITC^DeltaCom is unable to satisfy the Commission's July 1, 2004, deadline.

ITC^DeltaCom is a full service telecommunications provider serving customers throughout the southeastern United States. Using a fiber optic network of approximately 9,640 miles in length and its own switching infrastructure, ITC^DeltaCom combines facilities-based long distance, local services, data and Internet network services, and customer telephone equipment in a bundled package of telecommunications services and products.

In October 2003, ITC^DeltaCom, Inc., the parent holding company of ITC^DeltaCom Communications, Inc., acquired BTI, a competitive local exchange carrier also

³ *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd at 19975; 47 C.F.R. § 64.1320(a)-(b). In pertinent part, section 64.1320(a) states, "all Completing Carriers must undergo a system audit of their section 64.1310(a)(1) tracking system by an independent third party auditor...." Section 64.1320(b) requires "each Completing Carrier ...[to] file an audit report from the auditor (the "System Audit Report") regarding the Completing Carrier's compliance with section 64.1310(a)(1) as of the date of the audit with the Commission's Secretary in CC Docket No. 96-128 and with each payphone service provider for which it completes calls and with each facilities-based long distance carrier from which it receives payphone calls."

⁴ *New Payphone Compensation Rules Will Go Into Effect on July 1, 2004, Public Notice*, DA 04-1309 (rel. May 11, 2004).

⁵ See Affidavit of Sara Plunkett, ITC^DeltaCom Communications, Inc. ¶ 5 (June 4, 2004) (stating that accounting firms will not commit to satisfying the July 1, 2004, date) ("Plunkett Affidavit").

operating in the southeastern United States.⁶ In January 2004, ITC^DeltaCom, Inc. began the process of integrating the networks of ITC^DeltaCom Communications, Inc. and BTI.⁷ This process is extremely time and labor intensive, and ITC^DeltaCom, Inc. has devoted substantial company resources to completing the project, which will continue through the end of 2004.⁸ This network integration includes, but is not limited to, the merging of switch locations, decommissioning certain switches, local and IXC call routing, SS7 signaling, interconnecting fiber optic networks, network management, monitoring the new networks, and consolidating vendor and service contracts.⁹

The companies currently are at a critical point in the integration process; specifically, since each company's network uses different switching vendors, ITC^DeltaCom is facing several challenges in the integration process to ensure that customers' calls will be routed accurately and that customers will be billed accurately for local and long-distance services.¹⁰ The integration process has required the reassignment of personnel, on a full-time basis, to the integration effort.¹¹

As a result, it is neither practical nor technically feasible to audit ITC^DeltaCom's payphone compensation system by July 1, 2004. As discussed more fully below, ITC^DeltaCom and BTI each maintain separate payphone compensation systems that currently are being

⁶ See Affidavit of Pamela Schaard, ITC^DeltaCom Communications, Inc., ¶ 4 (June 4, 2004) ("Schaard Affidavit").

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ¶ 5.

¹¹ *Id.* ¶ 4.

integrated.¹² If an audit were to be conducted at this juncture, the audit would examine two legacy payphone compensation systems, neither of which will be in place once the integration is complete, thus not accurately reflecting ITC^DeltaCom's payphone compensation system. In addition, as a technical matter, ITC^DeltaCom cannot now conduct a payphone compensation system audit without having to halt and undo certain aspects of the system integration. Furthermore, even though an outside independent auditor would conduct the audit, the audit process still requires substantial technical support, and given the timing of the systems integration, ITC^DeltaCom cannot provide the IT support and commit the resources necessary to complete the FCC-mandated audit by July 1, 2004.¹³

II. DISCUSSION

Pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Commission may waive any provision of its rules where "good cause" is shown.¹⁴ The Commission has concluded that good cause exists where "special circumstances warrant a deviation from the general rule, such deviation serves the public interest, and a waiver would be consistent with the principles underlying the rule."¹⁵ Indeed, the United States Court of Appeals for the D.C. Circuit has stated that granting a waiver may be appropriate if: (1) special

¹² *Id.*

¹³ *Id.*

¹⁴ 47 C.F.R. § 1.3.

¹⁵ *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket No. 98-137, *Ameritech Corporation Telephone Operating Companies' Continuing Property Record Audit, et. al.*, CC Docket No. 99-117, *GTE Telephone Operating Companies Release of Information Obtained During a Joint Audit*, AAD File No. 98-26, Further Notice of Proposed Rulemaking, FCC 00-119, at note 8 (rel. April 3, 2000) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (1969); *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983)).

circumstances support a finding that strict adherence would not be in the public interest; and (2) a grant of waiver would not undermine the underlying policy objectives of the rule in question.¹⁶ As explained below, good cause exists for granting the waiver requested herein.

Due to ongoing system integration process, ITC^DeltaCom respectfully requests that the Commission grant it a waiver of six months, until January 1, 2005, in which to complete the initial system audit and to file the System Audit Report with the Commission, PSPs and IXC's, as applicable. Special circumstances warrant granting an extension of time to ITC^DeltaCom in which to conduct the audit. Granting a temporary waiver of the audit requirement is in the public interest and is consistent with the underlying policy objectives of the audit requirement, because it will enable the auditor to review the system that will be in place going forward instead of two systems that will be dismantled.

A. Special Circumstances Warrant a Deviation from the Audit Requirement

Special circumstances warrant a deviation from the requirement that ITC^DeltaCom complete the payphone tracking system audit and submit the System Audit Report to the Commission, PSPs, and IXC's, by July 1, 2004. As stated above, as a result of the acquisition of BTI, in January 2004, ITC^DeltaCom, Inc. began to integrate the networks of the two companies.¹⁷ The network integration includes, but is not limited to, the merging of switch locations, decommissioning certain switches, local and IXC call routing, SS7 signaling, interconnecting fiber optic networks, network management, monitoring the new networks, and consolidating vendor and service contracts.¹⁸

¹⁶ *WAIT Radio*, 418 F.2d at 1157.

¹⁷ Schaard Aff. ¶ 4.

¹⁸ *See id.*

ITC^DeltaCom is at a critical stage in the network integration process, and it is impractical to conduct the payphone audit at this time.¹⁹ As an initial matter, ITC^DeltaCom and BTI operate separate payphone compensation systems that will be integrated into one system.²⁰ If the audit were to be conducted at this juncture, the auditor would be examining two payphone systems that will not be in place on a going-forward basis once the system integration has been completed. Therefore, as a practical matter, it makes sense to delay conducting the audit until the payphone compensation systems have been integrated.

Furthermore, even if ITC^DeltaCom could devote the necessary resources, the audit companies that it has contacted will not commit to completing the audit by July 1, 2004.²¹ ITC^DeltaCom has contacted several different auditing companies in an effort to satisfy the auditing requirement.²² Due to the high volume of audits that they have been asked to conduct, these companies have told ITC^DeltaCom that they cannot commit to completing the audit by July 1, 2004.²³

In addition, it is not technically feasible to conduct the payphone audit at this time given the current state of the network integration. To complete the required audit, ITC^DeltaCom would need to delay and defer the system integration process, and, in fact, would need to put certain systems back in place so that the audit could be conducted in an appropriate manner. Doing so would unnecessarily disrupt and delay the system integration process of the

¹⁹ *Id.*

²⁰ *Id.*

²¹ Plunkett Aff. ¶ 5.

²² *Id.*

²³ *Id.*

networks, with regard not only to payphone compensation but also to the carrier's network as a whole.

Even if it were technically feasible to conduct the audit by July 1, 2004, ITC^DeltaCom cannot feasibly devote the personnel resources necessary to conduct the audit by July 1, 2004.²⁴ The network integration process is extremely labor and time intensive and ITC^DeltaCom has devoted substantial company resources to completing the project, including reassigning personnel on a full-time basis to the integration effort.²⁵ Although the audit will be conducted by an outside auditor, ITC^DeltaCom still will need to devote substantial internal resources to assist the auditor. ITC^DeltaCom cannot now reallocate resources without jeopardizing the network integration. When ITC^DeltaCom began the network integration process, it did not anticipate that the Commission's payphone audit requirement would coincide with this critical point in the network integration process.²⁶

B. Granting ITC^DeltaCom's Waiver is in the Public Interest

It is in the public interest to grant ITC^DeltaCom's waiver request. In *WAIT Radio v. FCC*, the Court stated that considerations of "hardship, equity, or more effective implementation of overall policy, [are] considerations that an agency cannot realistically ignore."²⁷ Requiring strict compliance with the July 1 deadline would jeopardize ITC^DeltaCom's integration process, would cause unnecessary and undue hardship, and would prevent ITC^DeltaCom consumers from benefiting from the efficiencies to be gained through

²⁴ Schaard Aff. ¶ 6.

²⁵ *Id.* ¶ 4.

²⁶ *See id.* (stating that both companies began the physical integration of their networks in January 2004).

²⁷ *WAIT Radio*, 418 F.2d at 1159.

network integration. By granting this Petition, the Commission will be acting in the public interest by encouraging business growth and efficiency, and the inevitable resulting benefits to consumers.

C. Granting a Waiver Is Consistent with the Policy Objectives Underlying the Audit Requirement

Granting ITC^DeltaCom's temporary waiver request is consistent with the underlying policy objectives of the audit requirement. The Commission adopted the payphone audit requirement in furtherance of the Congressional mandate that PSPs are to be compensated for each and every completed call.²⁸ In doing so, the Commission sought to ensure that carriers have employed appropriate systems to track each and every compensable payphone call. If ITC^DeltaCom were to audit its payphone compensation system by July 1, then it would be auditing two separate systems, neither of which would be in place once the system integration is complete. Auditing systems that are on the brink of being dismantled in no way furthers the Commission's goal – and the statutory mandate – of ensuring fair compensation for PSPs.

By permitting ITC^DeltaCom to complete the necessary system integration prior to conducting the audit, the auditors will be able to audit the payphone compensation system that will be used on a going forward basis. In addition, ITC^DeltaCom will be better able to manage and oversee the audit process. Moreover, extending the initial audit deadline for six months will not have an adverse impact on any party. The unique circumstances surrounding its recent acquisition, and resulting system integration, not only satisfy – but epitomize – the

²⁸ See, e.g., *Payphone Audit Report and Order*, ¶ 38 (stating that "[t]o improve upon past attempts to fairly compensate the PSP, [the Commission requires] the SBR to establish its own comprehensive call tracking system"... and "[t]o ensure the accuracy of the SBR's call tracking system...the rules that [the Commission adopts] require that the SBR: (1) engage an independent, third-party auditor to verify the accuracy and reliability of the SBR's call tracking system...").


Commission's waiver standards. As such, ITC^DeltaCom respectfully request that the Commission extend the initial audit deadline six months, until January 1, 2005.

III. CONCLUSION

For the foregoing reasons, ITC^DeltaCom respectfully requests that the Commission grant this Petition for Waiver by extending the initial audit deadline for six months, until January 1, 2005.

Respectfully submitted,

Nanette S. Edwards
Director – Regulatory Advocacy
ITC^DELTACom COMMUNICATIONS, INC.
4092 S. Memorial Parkway
Huntsville, Alabama 35802
Tel: 256-382-3856


Robert J. Aamoeth
Jennifer J. Kashatus
KELLEY, DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Tel: 202-955-9600
Fax: 202-955-9792

*Counsel for ITC^DeltaCom
Communications, Inc. and
Business Telecom, Inc.*

Dated: June 8, 2004

FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

JUN - 8 2004

Federal Communications Commission
Office of Secretary

In the Matter of The Pay Telephone)
Reclassification and Compensation Provisions) CC Docket No. 96-128
Of the Telecommunications Act of 1996)

AFFIDAVIT OF SARA PLUNKETT

I, Sara Plunkett, being duly sworn, depose and say as follows:

1. The facts contained herein are true and based upon my personal knowledge.
2. I am a citizen and resident of Alabama. I am 54 years of age. I am not under any disability and I am fully competent to make this affidavit.
3. My name is Sara Plunkett. I am employed as Vice President – Finance by ITC^DeltaCom Communications, Inc. (“ITC^DeltaCom”) and also have responsibility for accounting functions for Business Telecom, Inc. (“BTI”). My business address is 4092 S. Memorial Parkway, Huntsville, AL 35802. I have been employed by ITC^DeltaCom for approximately fifteen (15) years, and I am responsible for the coordination of our independent audits. I am also a certified public accountant in the state of Alabama. Prior to working for ITC^DeltaCom, I was employed by an incumbent local exchange carrier in a management role, and prior to that, I worked in the audit department of PricewaterhouseCoopers, a major accounting firm.
4. I have reviewed the FCC’s Payphone Order released on October 3, 2003.
5. I contacted more than one reputable auditing firm and the range of costs to meet the FCC’s audit requirements is as high as \$150,000. I believe that this is primarily due to the unique nature of the FCC’s audit requirements. Additionally, ITC^DeltaCom and BTI both use National Payphone Clearinghouse (“NPC”), along with many other carriers. Through our contacts at NPC, I have learned that several other carriers are receiving similar quotes. Furthermore, the firms we have consulted have affirmatively stated that it is unlikely that they could meet the July 1, 2004, deadline for completing the audit.

6. Based on the foregoing and current resource constraints due to our recent acquisition of BTI, as more fully described in Ms. Schaad's affidavit, ITC^DeltaCom and BTI are not capable of meeting the July 1, 2004 deadline for completion of the audit.

Further, affiant sayeth not.



Sara Plunkett
Vice President – Finance
ITC^DeltaCom, Inc.
4092 S. Memorial Parkway
Huntsville, Alabama 35802

Sworn and subscribed before me
This 4th day of June, 2004



Notary Public
My Commission Expires:

Vickie Shaw
Notary Public
My Commission Expires
December 4, 2005

FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

JUN - 8 2004

Federal Communications Commission
Office of Secretary

In the Matter of The Pay Telephone)
Reclassification and Compensation Provisions)
Of the Telecommunications Act of 1996)

CC Docket No. 96-128

AFFIDAVIT OF PAMELA SCHAARD

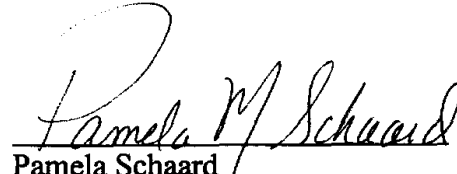
I, Pamela Schaard, being duly sworn, depose and say as follows:

1. The facts contained herein are true and based upon my personal knowledge.
2. I am a citizen and resident of North Carolina. I am over eighteen (18) years of age. I am not under any disability and I am fully competent to make this affidavit.
3. My name is Pamela Schaard. I am employed as Vice President of Information Technology Services (ITS) by ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and Business Telecom, Inc. ("BTI"). My business address is 4300 Six Forks Road, Raleigh, North Carolina 27609. Prior to the acquisition of BTI by ITC^DeltaCom, Inc., I was employed at BTI for approximately eight (8) years. In total I have more than twenty-five (25) years of experience in managing large-scale data centers, IT infrastructure, and business systems.
4. ITC^DeltaCom, Inc. acquired BTI in the fall of 2003. Beginning in January of 2004, ITC^DeltaCom Communications, Inc., a competitive local exchange carrier ("CLEC") and interexchange carrier ("IXC"), and BTI, also a CLEC and an IXC, began to integrate the networks of the two companies to capture more cost efficiency and to improve the quality of the core network. ITC^DeltaCom and BTI currently maintain separate payphone compensation systems that will be integrated as part of this integration project. IT is heavily involved in the integration efforts. Both companies began the physical integration of their networks in January 2004 and are currently at our peak level of projects. We will remain at our peak levels of resources throughout the remainder of the 2004-year. The network integration includes, but is not limited to, the merging of switch locations, decommission of certain switches, local and IXC call routing SS7 signaling, interconnecting fiber optic networks, network management and monitoring of the new networks and consolidation of vendor and service contracts. This peak level of effort required IT to reassign people to this integration effort on a full-time basis.

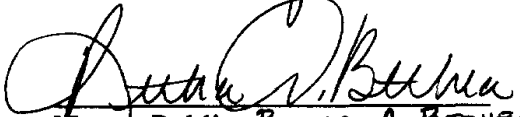
5. Since both networks used different vendors for switching, challenges in the integration of the network are (a) communication and (b) coordination between IT and Accounting departments to insure customers will be routed and billed properly for the local and long-distance services/calls and cross-training employees on new equipment and vendors.

6. Based on the foregoing and current resource constraints due to our recent acquisition of Business Telecom, Inc., we are simply not capable of meeting the July 1, 2004 deadline for completion of the audit.

Further, affiant sayeth not.


Pamela Schaad
Vice President of ITS

Sworn and subscribed before me
This 4 day of June, 2004


Notary Public RETHA A. BETHEA
My Commission Expires: January 26, 2005